

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**LABORERS' LOCAL 265 PENSION FUND)
and PLUMBERS AND PIPEFITTERS)
LOCAL NO. 572 PENSION FUND,)**

Plaintiffs,

v.

iSHARES TRUST, et al.,

Defendants.

Civil No. 3:13-cv-00046

Judge Trauger

Magistrate Judge Knowles

**MOTION OF DEFENDANTS ISHARES TRUST, ISHARES, INC., THE
ETF DEFENDANTS, BLACKROCK FUND ADVISORS, BLACKROCK
INSTITUTIONAL TRUST COMPANY, N.A., ROBERT S. KAPITO
AND MICHAEL LATHAM TO DISMISS THE COMPLAINT**

Defendants iShares Trust, iShares, Inc., the ETF Defendants,¹ Blackrock Fund Advisors, Blackrock Institutional Trust Company, N.A., Robert S. Kapito and Michael Latham, by and through their undersigned counsel, hereby move to dismiss Plaintiffs' Complaint (the "Complaint") with prejudice pursuant to Rules 12(b)(6) and 23.1 of the Federal Rules of Civil Procedure. As set forth in further detail in the Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint, the Complaint should be dismissed for the following reasons:

1. **Count I** of the Complaint is brought pursuant to Section 36(b) of the Investment Company Act of 1940 (the "ICA"), 15 U.S.C. § 80a-35(b), which regulates compensation paid to investment advisers or their affiliates. The scope of the private right of action authorized under this provision is limited by Section 36(b)(4) of the ICA. It provides that Section 36(b) shall not apply to any

¹ The ETF Defendants are iShares Russell Midcap Index Fund, iShares MSCI EAFE Index Fund, iShares MSCI Emerging Markets Index Fund, iShares Russell 2000 Growth Index Fund, iShares Russell 2000 Value Index Fund, iShares Core S&P Mid Cap Index Fund, iShares Core S&P Small-Cap Index Fund, and iShares Dow Jones US Real Estate Index Fund.

compensation paid in connection with transactions subject to Section 17 of the ICA, 15 U.S.C. § 80a-17, or any orders issued under Section 17 by the Securities and Exchange Commission ("SEC"). The compensation at issue in this action (the "Fees") was paid in connection with securities lending transactions that, by plaintiffs' own admission, are subject *both* to Section 17 *and* an order issued by the SEC exempting defendants from compliance with Section 17. Consequently, plaintiffs have no claim under Section 36(b) of the Complaint, and **Count I** should be dismissed.

2. At a minimum, **Count I** should be dismissed as against all of the individual defendants because the Complaint nowhere alleges that any of them received any Fees, an omission that is fatal to plaintiffs' Section 36(b) claim against these individuals.
3. **Counts II** and **III** of the Complaint allege claims pursuant to Section 47(b) and Section 36(a) of the ICA, respectively. *See generally* U.S.C. § 80a-46(b) (Section 47(b)); *id.* § 80a-35(a) (Section 36(a)). Because there is no private right of action under either section, **Counts II** and **III** should be dismissed.
4. Even if there were a private right of action, which there is not, **Counts II** and **III** nevertheless should be dismissed on the separate and independent ground that plaintiffs lack standing to assert the purely derivative claims alleged in those counts. Plaintiffs lack standing because they have not satisfied the presuit demand requirements applicable to their derivative claims under governing state law and Rule 23.1 of the Federal Rules of Civil Procedure.

WHEREFORE, for the reasons stated herein and in further detail in the attached Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint, Defendants iShares Trust, iShares, Inc., the ETF Defendants, Blackrock Fund Advisors and Blackrock Institutional Trust Company, N.A., Robert S. Kapito and Michael Latham respectfully request that the Court dismiss the Complaint with prejudice pursuant to Rules 12(b)(6) and 23.1.

Dated: Nashville, Tennessee
March 11, 2013

s/ John R. Jacobson

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Index Fund; iShares Dow Jones US Real
Estate Index Fund; Blackrock Fund
Advisors; Blackrock Institutional Trust
Company, N.A.; Robert S. Kapito; and
Michael Latham*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served via the Court's ECF system on this 11th day of March, 2013, upon:

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